UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 17, 1997 Decided November 7, 1997

No. 96-1277

PATENT OFFICE PROFESSIONAL ASSOCIATION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

On Petition for Review of an Order of the
United States Patent Office

Lynne K. Zusman was on the briefs for petitioner.

David M. Smith, Solicitor, Federal Labor Relations Authority, *William R. Tobey*, Deputy Solicitor, and *James F. Blandford*, Attorney, were on the brief for respondent.

Before: WILLIAMS, SENTELLE AND ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS..

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX A

ROGERS, *Circuit Judge*: Petitioner, Patent Office Professional Association ("the Association"), asks this court to review a decision of the General Counsel of the Federal Labor Relations Authority ("FLRA" of "the Authority") not to issue an unfair labor practice complaint against the Patent and Trademark Office ("Patent Office"). Although it has long been clear in this circuit that such decisions are not judicially reviewable, v. *see Turgeon v. FLRA*, 677 F.2d 937, 938-39 (D.C. Cir. 1982), petitioners contend that subsequent cases have created exceptions to that rule. We disagree, and hence we dismiss the petition for lack of jurisdiction.

I.

This is the latest episode in the interminable struggle of the Association and the Patent Office to reach an agreement on employee performance appraisals, a struggle that started in May 1981. The events relevant to this petition began in 1989, when an interest arbitrator ordered the Association and the Patent Office to adopt certain provisions regarding performance appraisals. After FLRA upheld only some of these provisions on appeal within the agency, both sides petitioned this court for review. In *Patent Office Professional Ass'n v. FLRA*, 26 F.3d 1148 (D.C. Cir. 1994), the court held that the arbitrator had been without jurisdiction as to certain provisions and that other disputed provisions were non-negotiable. *See id.* at 1153-57.

In July 1994, soon after the decision's release, negotiations recommenced, but with no quick resolution. In September 1994, in an attempt to end the talks, the Association withdrew those provisions that the court had held to be outside the arbitrator's jurisdiction and those held non-negotiable. The Patent Office did not respond, however, neither suggesting replacement provisions nor agreeing to implement the remaining provisions. In March 1995, after nearly six months of silence by the Patent Office, the Association filed a claim with FLRA that

charged the Patent Office with an unfair labor practice, in that its continued refusal to implement the agreement, which allegedly now contained only undisputed provisions, violated 5 U.S.C. §§ 7114(b)(5), 7116(a)(1), (5), (8).

Under the Federal Service Labor-Management Relations Statute ("Labor-Management Relations Act"), the Association was entitled to a hearing on its charge against the Patent Office only if the General Counsel issued an unfair labor practice complaint. *See* 5 U.S.C. § 7118(a) (1988). Concluding that the Patent Office was under no obligation to implement the provisions that remained after the Association's modifications, however, the General Counsel refused to issue such a complaint. There was no unfair labor practice in the Patent Office's refusal to implement the agreement, the General Counsel decided, because there was no agreement: even if this court's opinion had resolved certain issues, there still had been no "meeting of the minds" on the disputed provisions.

II.

The Association seeks review of the General Counsel's decision not to issue a complaint pursuant to the judicial review provision of the Labor-Management Relations Act, under which aggrieved persons can obtain judicial review of "any final order of the Authority" (with exceptions not pertinent here). 5 U.S.C. § 7123(a) (1988). In *Turgeon*, this court declared flatly that it has no jurisdiction to review decisions by the General Counsel of FLRA declining to issue unfair labor practice complaints because such decisions do not constitute final orders of the agency. See *Turgeon*, 677 F.2d at 988-89. In an attempt to establish that this count has jurisdiction despite *Turgeon*, the Association emphasizes the Supreme Court's intervening decision in *Heckler v. Chaney*, 470 U.S. 821 (1987). Yet that case *narrowed* the class of decisions subject to review: the main proposition established in *Heckler* was that agency decisions not

to take enforcement actions are generally not subject to review under the Administrative Procedure Act. *See id.* at 830-35. The Association, however, focuses on a footnote in *Heckler* in which the Supreme Court noted that it did not decide whether an agency's discretionary decision not to exercise its enforcement authority might be subject to review if the decision was based either on the agency's conclusion that it lacked jurisdiction or on a general policy "so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (in banc)). The Ninth Circuit cited this footnote as a basis for its conclusion in *Montana Air Chapter No 29 v. FLRA*, 898 F.2d 753 (9th Cir. 1990), that the Supreme Court had endorsed such exceptions to the general rule that discretionary agency enforcement decisions are not reviewable. *See id.* at 756. Thus, the Association contends, this court can review decisions of the General Counsel not to issue unfair labor practice complaints when such decisions are the result of a misguided agency policy.

Lest there be any lingering confusion, we write to make clear that, even after *Heckler v. Chaney*, it remains the law of this circuit that a decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable given that the statue provides for review only of decisions of the Authority. In *Heckler*, the Supreme Court dealt with jurisdiction under the Administrative Procedure Act and, specifically, the provision that provides that "agency action . . . committed to agency discretion by law" is not subject to judicial review under the act. 5 U.S.C. § 701(a)(2) (1988); *see Heckler*, 470 U.S. at 828-35. Nothing in *Heckler*— and especially not the Association's favored footnote-- affects the reviewability of decisions of the General Counsel under the Labor-Management Relations Act, and this court has already held that the statute does not allow judicial review of the General Counsel's decision not to issue unfair labor practice complaints. *See Turgeon*, 677 F.2d at 939.

Nor could the Association claim the Administrative Procedure Act as an independent source of jurisdiction: agency actions are not reviewable under that act if other "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), and *Turgeon* definitively establishes such preclusion by the Labor-Management Relations Act. Both this court and the Supreme Court have declared, even after *Heckler*, that decisions of the General Counsel of the National Labor Relations Board whether to issue complaints are not subject to review by this court, *see NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 117-33 (1987); *Beverly Health & Rehabilitation Servs., Inc. v. Feinstein*, 103 F.3d 151, 154 (D.C. Cir. 1996), and we now reaffirm the same for the General Counsel of FLRA. *Turgeon's* force continues unabated.[1] *Cf. Turgeon*, 677 F.2d at 939-40. Accordingly, because the court is without jurisdiction to review the General Counsel's decision not to issue an unfair labor practice complaint, we dismiss the petition for review.

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[1] Our reasoning is specific to the Labor-Management Relations Act, and we thus do not question the cases in this circuit that allow judicial review of agency nonenforcement decisions in certain other contexts. Most importantly, we do not disturb this circuit's exceptions to the general rule, under *Heckler*, that § 701(a)(2) of the Administrative Procedure Act precludes judicial review over nonenforcement decisions. *See, e.g., Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 674-77 (D.C. Cir. 1994); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); *National Wildlife Fed'n v. EPA*, 980 F.2d 765, 772-73 (D.C. Cir. 1992); *Safe Energy Coalition v. United States Nuclear Regulatory Comm'n*, 866 F.2d 1473, 1476-80 (D.C. Cir. 1989); *International Longshoremen's Ass'n v. National Mediation Bd.*, 785 F.2d 1098, 1100-01 (D.C. Cir. 1986); *Adams*, 480 F.2d at 1162.

5 U.S.C. 551. Definitions

For the purposes of this subchapter-

* * *

(6) "order" means the whole or a part of a final disposition, whether affirmative , negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

* * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

* * *

5 U.S.C. 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that-

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter-

* * *

(2) "Person", "rule", "order", "license", "sanction", "relief", and" agency action" have the meanings given them by section 551 of this title.

APPENDIX B

5 U.S.C. 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of-

> (1) the date on which the member's successor takes office, or
> (2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may--

(A) investigate alleged unfair labor practices under this chapter,
(B) file and prosecute complaints under this chapter, and
(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

5 U.S.C. 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of

consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter--

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may--

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue supbenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

5 U.S.C. 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice--

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during 6-month period referred to in subparagraph (A) of this

paragraph by reason of--

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such

purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complain has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order--

> (A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;
>
> (B) requiring the parties to renegotiate a collective bargaining agreement in accordane with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;
>
> (C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or
>
> (D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall

issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

5 U.S.C. 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeal in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order

unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a

restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.